Petition

81-1421

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALAN H. SEDELBAUER,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF INDIANA

ROBERT EUGENE SMITH
Penthouse Suite E
16133 Ventura Boulevard
Encino, California 91436

Of Counsel:
ANJA MARIA SMITH
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309

PROFESSIONAL PRINTING SERVICES, INC., *Successor to The Paul M. Harrod Company*
P. O. Box 8594 • Baltimore, Maryland • 21234

QUESTIONS PRESENTED

1. Were Petitioner's rights to disseminate materials protected by the First and Fourteenth Amendments to the Constitution of the United States impermissibly chilled when the trial court instructed the jury that they may consider whether the material at issue had been pandered, even though no evidence of "pandering" as set forth in *Ginzburg v. U.S.*, 383 U.S. 463, was adduced at trial?

2. Is evidence which shows that Petitioner neither knew the nature, nor the character and contents of the materials sold, constitutionally sufficient to support a conviction on the issue of *scienter*?

3. Were Petitioner's First and Fourteenth Amendment rights violated when the Trial Court substituted for Petitioner's jury instructions of "tolerance" in determining community standards, the much narrower standard of "acceptance"?

4. Do the materials charged against Petitioner constitute protected expression under the First and Fourteenth Amendments to the Constitution of the United States, because they are not obscene as a matter of law?

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALAN H. SEDELBAUER,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF INDIANA

The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Indiana Supreme Court entered in the above case on November 30, 1981, reversing the Court of Appeals of Indiana's opinion dated April 2, 1980. Justice DeBruler dissenting.

OPINION BELOW

The opinion of the Supreme Court of Indiana is not yet reported, but a copy thereof is set forth in Appendix A hereto. The opinion of the Court of Appeals of Indiana is reported at 402 N.E.2d 1006 (1980), and a copy thereof is set forth in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals of Indiana was entered on April 2, 1980. The Court's opinion on rehearing is set forth at 405 N.E.2d 566, a copy of which is attached hereto as Appendix C. Thereafter the Supreme Court of Indiana reversed the Court of Appeals judgment on November 30, 1981, Justice DeBruler dissenting. The Court's jurisdiction is invoked under Title 28 United States Code Ann. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution are set forth in Appendix D hereto.

STATEMENT OF THE CASE

On May 15, 1978, John Stephen Holsworth, a Detective with the Fort Wayne Police Department, proceeded to the Swinger World Bookstore on West Main Street, Fort Wayne, Indiana. He entered the store and purchased one 8 mm film entitled "Sweet Dixie" and one magazine entitled "Desire" from Petitioner, Alan Sedelbauer.[1] After making the purchase, Detective Holsworth identified himself as a police officer and asked Petitioner for identification. A criminal information was then filed against Petitioner, charging him with Distributing Obscene Matter for Consideration in violation of *Indiana Code* 35-30-10.1-2(2) on two counts.

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[1] Petitioner was the only party in the proceedings below.

At the trial below, Detective Holsworth testified as to the purchases of the magazine and film at the Swingers World Bookstore on May 15, 1978. Testimony further showed that the exterior appearance of the Swingers World Bookstore consisted of glass windows and signs stating, "Adult News and Bookstore," "Swingers World Bookstore," and "Films and Peep Shows." Defendant testified that he had no knowledge of the content of the movie and magazine as to which he rang up the sale to Detective Holsworth and that he had only been employed for a few months at the store before the event of May 15, 1978 occurred.

At the conclusion of the trial, the jury found Appellant guilty on both counts and he was sentenced to thirty (30) days imprisonment and a Three Thousand Dollar ($3,000.00) fine on each count. He appealed his conviction to the Court of Appeals of Indiana, Fourth District, which reversed the trial court's judgment. The prosecution appealed to the Supreme Court of Indiana, which reversed the Court of Appeals and upheld the trial court's judgment in all respects, Justice DeBruler dissenting. Petitioner seeks review from the Supreme Court of Indiana's judgment.

REASONS FOR GRANTING WRIT

I.

Petitioner's Rights To Disseminate Materials Protected By The First And Fourteenth Amendments To The Constitution Of The United States Were Impermissibly Chilled When The Trial Court Instructed The Jury That They May Consider Whether The Material At Issue Had Been Pandered, Even Though No Evidence Of "Pandering" As Set Forth In *Ginzburg v. U.S.*, 383 U.S. 463, Was Adduced At Trial.

This issue especially deserves review in that the decision by the Supreme Court of Indiana, authored by Chief Justice Givan, conflicts directly with the teaching of this Court in the case of

Ginzburg v. U.S., 383 U.S. 463 (1966), in the following particulars.

The substance of the testimony at trial was that a law enforcement officer purchased one 8 mm film entitled "Sweet Dixie" and one magazine entitled "Desire" from Petitioner. During the trial, no evidence of methods of production, editorial goals or motivation was offered by the prosecution. Furthermore, there was no showing that the movie at issue appealed to prurient interest. The only other evidence offered by the State and bearing on the issue of "pandering" was that the state's witness also testified as to the signs outside the bookstore ("Swingers World Bookstore," "Adult News and Bookstore," and "Films and Peep Shows") as well as the signs inside the store affixed on a magazine rack.

Chief Justice Givan, in his opinion writing for the majority of the Court, concedes that the pictures contained in the magazine "might be placed in a medical book for demonstrative purposes and in such surrounding would be perfectly acceptable" (A. 7). However, the Court stated, that the "gaudy color and design," the "large letters one and three-quarter inches in height" in which the word "Desire" is written, and the words "A Magazine for Adults Only" coupled with the price tag on the face of the magazine quoting $10.00 portraying "a couple engaged in oral-genital sexual contact" make it abundantly clear that the magazine was "produced and sold for the purpose of commercial exploitation of erotica solely for the sake of prurient appeal.

By its interpretation of "pandering" the Supreme Court of Indiana has thus blatantly misconstrued the *Ginzburg* decision, promulgated by this Court. Justice DeBruler of the Indiana Supreme Court, dissenting from the majority opinion, recognized the lack of evidence, stating:

> "I agree with the Court of Appeals that there was no evidence to warrant giving the instruction on pandering. . . . A state has a legitimate interest in prohibiting disseminating or exhibition of obscene material *when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or exposure to juveniles.*" (Emphasis the Justice's)

Justice DeBruler further observed with respect to the signs on the building of the bookstore:

> "The mere advertising of the name 'Swingers World Bookstore' and a plain description of the nature of the materials sold there as 'adult' is not evidence of the kind of obtrusive advertising contemplated by the United States Supreme Court as a factor to be considered 'to aid a jury in its determination of whether materials are obscene. . . .' There is no evidence of the kind of representation of the materials as 'would tend to *force public confrontation* with the potentially offensive aspects of the work. . . ." (Emphasis the Justice's) (A. 11).

In its determination, the majority opinion by Chief Justice Givan erroneously ascribed weight to the fact that a profit may have been derived from the sale of the publication, because of its price tag. This Court has clearly observed in *Ginzburg, supra,* that:

> ". . . No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold, cannot themselves be adjudged obscene in the abstract; *to sanction consideration of this fact might indeed induce self-censorship,* and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the First Amendment." (Emphasis added) 383 U.S. 463.

The type of censorship flowing from the opinion by the Indiana Supreme Court would effectively curtail the type of materials a bookseller may display. Such censorship has been proscribed by this Court in *Smith v. California,* 361 U.S. 147, 153-54 (1959), observing that such action would:

> "tend to restrict the public's access to forms of the printed word which the state could not constitutionally suppress directly. The bookseller's self-censorship compelled by the state would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books both obscene and not obscene would be impeded."

It is further made abundantly clear in *Roth v. U.S.,* 354 U.S. 476 (1957) and its progeny, that all ideas, even with the

slightest importance, be they unorthodox, controversial, or even hateful, have the full protection of the First Amendment guarantees, unless they encroach upon more important interests. The pandering concept of *Ginzburg* is not triggered merely by an open exhibition of sexually explicit materials, but by the use of advertising "displaying the leer of the sensualist" which is thrust upon the unsuspecting public. Justice Brennan emphasized:

> "Such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publication by those who are offended by such material." *Id.* at 470.

The Supreme Court of Indiana further erred in upholding the trial court on the issue of pandering, because the *Indiana Criminal Code* 35-30-10 *et seq.* does not define or set forth a crime of "pandering". The trial court therefore should not have given this instruction, since the state legislature has not created such a crime, and since the prosecution did not charge in the indictment that the materials at issue were pandered.

The pandering instruction is perhaps the most potentially dangerous threat to First Amendment protections. As the instruction in effect permits the triers of fact to disregard the other constitutional standards of obscenity, this instruction must be exercised only with great caution. As no evidence of pandering was submitted in the proceedings below, and as the principal instructions contained no definition as to the nature and limits of the term pandering, this instruction constitutes gross prejudicial error. For the foregoing reason the Supreme Court of Indiana's opinion must be reversed as fatally defective and the conviction of the Petitioner should be reversed.

II.

Evidence Which Shows That Petitioner Neither Knew The Nature, Nor The Character And Contents Of The Sexually Explicit Material Sold Is Constitutionally Insufficient To Support A Conviction On The Issue Of *Scienter.*

Rather than basing its opinion on the legal ramifications of the evidence presented in the trial Court, the Supreme Court of Indiana makes the following emotional argument in response to Petitioner's reasoning on the *scienter* issue:

> "This question by the appellant borders on the ludicrous. Any adult human being who could pick up the packages, above described, and sell them to a customer in a store, as above described, would indeed be out of touch with reality if he did not know and understand the nature of the object he was selling." (A. 8).

The opinion essentially sets forth a "constructive knowledge" standard. Petitioner contends that a conviction predicated upon a finding of "constructive knowledge" is not constitutionally permissible. The seriousness of this question is well demonstrated by the fact that *certiorari* has been granted on this precise issue in *Ballew v. Georgia,* No. 76-761, question number 2, *certiorari* granted January 25, 1977. The *Ballew* case was decided on other grounds, however, and this Court therefore did not reach the issue of "constructive knowledge." See *Ballew v. Georgia,* 435 U.S. 223 (1978) (*Ballew I*), decided March 21, 1978. In *Ballew v. Georgia,* 436 U.S. 962 (1978) (*Ballew II*), the dissent by Justices Brennan, Stewart, and Marshall indicates that these Justices would have granted *certiorari* on the scienter issue in the following words:

> "I see no reason to suppose that this issue is any less worthy of consideration on certiorari now than it was when we accepted it in *Ballew I.* For this reason, I would grant certiorari."

Furthermore, the dissenting opinions by Justices Brennan, Marshall, and Stewart in *Sewell v. Georgia,* 435 U.S. 982 (1978) and in *Teal v. Georgia,* 435 U.S. 989 (1978), both

decided April 24, 1978, indicate that from a constitutional standpoint, jury instructions permitting a basing of *scienter* on "constructive knowledge" are impermissible under the Constitution of the United States.

Petitioner contends that predicating a conviction upon a finding of "constructive knowledge" is constitutionally impermissible under *Hamling v. United States*, 418 U.S. 87 (1974), where this Court enunciated the constitutional minimum standard of *scienter* as follows:

> "We think the 'knowingly' language of 18 U.S.C. § 1461 and the instructions given by the district court in this case satisfy the constitutional requirements of *scienter*. It is constitutionally sufficient that the 'prosecution show that the defendant *had* knowledge of the contents of material he distributes, and that he knew the character and nature of the materials.'" 418 U.S. at 123 (Emphasis added.)

Consistent with the above statement from *Hamling*, Petitioner contends that the prosecution must show that he "had" knowledge rather than that he "should have had" knowledge of the content, character and nature of the materials with which he was charged. In addition, it is here submitted that the dissenting opinions by three United States Supreme Court Justices, namely Justices Brennan, Marshall, and Stewart in *Teal*, and *Sewell, supra*, amply demonstrate the substantiality of the question. Indeed, Justice Brennan, with whom Justice Marshall joined, dissenting, states:

> "In *Ballew v. Georgia*, 435 U.S. [223] (1978), we granted certiorari to consider, but did not reach, the precise *scienter* issue now raised by appellant . . . I see no basis for concluding that a federal constitutional question sufficiently substantial to be granted review on certiorari is now so insubstantial to require exercise of our mandatory appellate jurisdiction in this case." *Sewell, supra*.

The United States Supreme Court's dismissal of the appeals in *Teal, Sewell*, and *Ballew II* thus clearly did not go to the merits of the *scienter* arguments, especially in light of the recognition by Justices Brennan, Marshall, and Stewart of the

importance of the question raised and the desirability of having various aspects of those issues further illuminated.

Petitioner submits that the instruction on *scienter*, as given by the trial Court, fails to meet the constitutional minimum standards of *scienter* set forth by this Court in *Hamling, supra.* As the Court is aware, the principles governing the issue of *scienter* in the area of *First Amendment* litigation originates with the decision in *Roth v. United States*, 354 U.S. 476 (1957).

In deciding *Roth v. United States, supra*, the Court stated that the obscenity statutes there involved and as construed were not too ambiguous to define a criminal offense. Each of the cases cited to support this ruling, however, stressed the fact that the respective statute involved was directed only at those with guilty knowledge or intent. See, *e.g., United States v. Petrillo*, 332 U.S. 1, 7-8 (1947); *United States v. Harris*, 347 U.S. 612, 624 n. 15 (1954); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952); *United States v. Ragen*, 314 U.S. 513, 523-524 (1942); *United States v. Wurzbach*, 280 U.S. 396 (1930); *Hygrade Provisions Co. v. Sherman*, 266 U.S. 497 (1925).

The constitutional validity of the obscenity statutes involved in *Roth* rested therefore, in significant measure upon the understanding that the statutes were not intended to apply to those who distribute material dealing with sex, but only to those who had knowledge that the particular material distributed was of obscene character and content.

The issue finally was resolved by the decision in *Smith v. California*, 361 U.S. 147 (1959). It was there held that the strict liability feature of the California obscenity ordinance there involved was seriously restricting the circulation of books which were not obscene, "by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold." 361 U.S. at 152. The tendency of the California ordinance, this Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity." 361 U.S. at 160.

In *Mishkin v. New York*, 383 U.S. 502 (1966), the Court stated:

> "The Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." 383 U.S. at 511.

In approving the authoritative interpretation placed upon the New York obscenity statute by the highest court of the state with respect to the "stringent *scienter* requirement" and "vital element of *scienter*," 383 U.S. at 507, 510 n. 5, the Court specifically noted that a parenthetical reference in the Court of Appeals' opinion to "knowledge of the contents of the books" was not to be read as a "modification of this definition of scienter." 383 U.S. at 510 n. 9:

Hamling, supra, sets forth that the prosecution must show that a defendant "had" knowledge of the content, character, and nature of the materials with which he is charged and that the jury must be thusly instructed. To hold otherwise would permit conviction solely on the basis of guesses and assumptions of police officers that a particular movie is obscene. To this effect, it is stated in the dissent in *Sewell, supra*:

> ". . . the constructive *scienter* requirement of § 26-2101(a), at least as applied in appellant's trial, provides no reasonable assurance that persons will know or ought to know when they are likely to violate § 26-2101(c)." *Sewell*, at 5.

The Justices thus recognize the impermissible chilling effect produced by the constructive knowledge instructions given in Petitioner's case. It is Petitioner's contention that when instructions of "constructive knowledge" are given, every purveyor of presumptively protected *First Amendment* material is at the mercy of an unpredictable jury determination that some facet of the title or cover of the material he distributes gave him reason to refrain from distributing such material until he could complete a review of it.

Petitioner does not contend that he can escape criminal liability by refusing to review the films and magazines he exhibits. If this were the case, some might refuse to review the material precisely because they "know" what they will find.

In a very real sense, such individuals might be held to actually know the content of the material despite the lack of a personal perusal.

What Petitioner does contend, is that he cannot be convicted in the absence of proof of what he actually knew, whether this actual knowledge is proved by circumstantial evidence or otherwise. The Petitioner was convicted upon constructive knowledge which imposes a duty to make inquiry whenever a jury decides that a reasonable and prudent person would have done so. The requirement of such an inquiry, at the risk of criminal liability, would seriously inhibit the distribution of non-obscene material which has some allusion, however vague or insubstantial, to sex or nudity in its title or cover. This is precisely the impermissible chilling effect condemned in *Smith v. California*, 361 U.S. 147 (1959), and the Supreme Court of Indiana's decision must thus be found constitutionally infirm.

III.

Petitioner's First And Fourteenth Amendment Rights Were Violated When The Trial Court Substituted For Petitioner's Jury Instructions Of "Tolerance" In Determining Community Standards, The Much Narrower Standard Of "Acceptance."

The opinion by the Indiana Supreme Court, authored by Chief Justice Givan upheld the trial Court's instruction regarding contemporary community standards of "acceptance" of sexually explicit materials, rather than of "tolerance." Clearly, both the Supreme Court of Indiana and the trial Court erred in holding that the narrow standard of "acceptance" is constitutionally applicable.

It is well settled constitutional law that Courts may not restrict the protection afforded by the United States Constitution as interpreted by the United States Supreme Court. *Leech v. American Booksellers Assoc., Inc.*, (Tenn. 1979), 582 S.W.2d 738, 735. While state courts may not restrict, they may expand constitutional protection, even where the state and federal

constitutions contain similar or identical provisions. 582 S.W.2d at 745.

By upholding the trial Court, the Supreme Court of Indiana clearly narrowed the constitutional mandates of the three standards set forth in *Miller v. California,* 413 U.S. 15 (1973). Such narrowing of constitutional mandates is in violation of Petitioner's rights under the First and Fourteenth Amendments to the Constitution of the United States, under *Miller* and its progeny.

The most significant cases since the *Miller* decision are *Hamling v. United States,* 418 U.S. 87 (1974); *Smith v. United States,* 436 U.S. 293 (1978). These cases make it clear that state courts may not encroach beyond the constitutional safeguards set by this Court in restricting speech and press or by expanding the standards for adjudicating obscenity *vel non.*

In this respect, Mr. Chief Justice Burger, writing for the majority of the Court observed in *Miller v. California:*

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found *tolerable* in Las Vegas, or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." (Emphasis added) 413 U.S. 15, 32.

In discussing the theme that obscenity is to be judged according to the average person in the community, this Court has stated in *Pinkus v. United States,* 436 U.S. 293 (1978).

> "The Court has held . . . local rather than national standards should be applied. *Hamling v. U.S., supra.* Similarly, obscenity is to be judged according to the average person in the community, rather than the most prudish or the most *tolerant*. . . ." (Emphasis added)

Here again, this Court has referred to the "toleration" standard, and not to the "acceptability" of the material. The question to be resolved therefore, is whether the materials are tolerated, and not whether they are acceptable, since that which is tolerated is of much wider scope than that which is acceptable by any given average person. It is clear that *Miller* and its progeny, in the context of a conviction in state court, refers to

that which is constitutionally "tolerated" within the boundaries of a political entity by the average person, and not that which is "acceptable" within the impermissibly narrower confines.

While the American Heritage Dictionary includes among the shades of meaning of the noun "acceptance" the words "approval," "favorable reception," "agreement" and "assent," (American Heritage Dictionary, 1969), the noun "tolerance" means that quality which encompasses:

> "1. The capacity for or practice of allowing or respecting the nature, beliefs, or behaviors of others; 2. a. Leeway for variation from a standard." *Supra,* at 1351.

Clearly, the multiple references by this Court in *Miller* and its progeny to the words "tolerable," "tolerant," and "toleration" refer to a community standard of "tolerating" beliefs and behaviors of others within a specific political entity, rather than to a standard of "acceptance" which is by definition equated with personal approval.

The "tolerance" test is precisely the type of test set forth in *Smith v. United States,* 431 U.S. 291, at 305 (1977) where this Court, in the course of its discussion of prurient interest and patent offensiveness observes:

> "[C]ontemporary community standards must be applied by juries in accordance with their own understanding of *tolerance* of the average person in their community. . ." (Emphasis added).

In a relatively recent decision, the Supreme Court of Tennessee in *Leech v. American Booksellers Assoc., Inc., supra,* has made the following pronouncement, totally rejecting the "acceptance" test:

> "It is obvious that the *acceptance test would lead to the indiscriminate branding as obscene much of protected speech that would otherwise pass the tolerance test.* As we have heretofore noted, we cannot encroach further upon the freedom of speech and press that the Miller standards permit, as a matter of federal constitutional law." (Emphasis added) 582 S.W.2d 738, at 748.

The application of the "acceptance" test by the Supreme Court of Indiana clearly impermissibly narrows the constitutional mandates set forth by this Court, and must be reversed.

IV.

The Materials Charged Against Petitioner Constitute Protected Expression Under The First And Fourteenth Amendments To The Constitution Of The United States Because They Are Not Obscene As A Matter Of Law.

Petitioner herein requested independent review of the magazine and movie at issue herein. The Supreme Court of Indiana, in its review did not take into consideration the tripartite *Miller* test, but rather discussed the importance of human sexuality and reproduction. Chief Justice Givan observed with respect to the film "Sweet Dixie":

> "There is nothing about the film or the cover in which it is contained that purports to be scientific or educational. *It is hardly the type of thing one would give to one's offspring to prepare them for their life as a sexual adult."* (Emphasis added) (A. 7).

Clearly, the obscenity test is not, whether certain sexually explicit material is fit for one's children. Children are not part of this test. See *Pinkus v. United States,* 436 U.S. 293 (1978). In addition the Chief Justice of the Supreme Court of Indiana remarked:

> "So long as the presentation of sexuality remains within the accepted forms of our literature and medical journals, these people do not perceive the same to be obscene but, in fact, a pleasureful, desired, and necessary part of the overall picture of a civilized society. However, *when presentation takes the form of a gaudy, flippant, frivolous, or distorted attitude the observer is then offended. A person who is quite willing to enter into a discussion of the sexuality of a human being with his children,* or who is quite willing to give them medical journals, some explicit in pictorial presentation, *suddenly finds himself with a type of presentation that would be wholly unacceptable to such use."* (Emphasis added, A.5-6)

Clearly, the Supreme Court of Indiana, in reversing the Court of Appeals, based its reasoning on purely emotional, and not on legal grounds, such as is required by *Miller v. California, supra.* Justice DeBruler, in his dissenting opinion, recognized that the majority's independent determination of obscenity "is not based upon application of the constitutional test for obscenity set out in *Miller v. California, supra,* and embodied in the obscenity statute under which Sedelbauer was charged." (A. 11)

This Court is respectfully requested to independently review the alleged obscenity of the magazine "Desire" and of the film "Sweet Dixie" constituting the basis of Petitioner's conviction.

The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in the United States Supreme Court's decision in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478 (1962). That case involved action by a local postmaster in withholding delivery of certain magazines after finding them obscene. The publishers who had mailed the magazines brought suit in the United States District Court seeking injunctive relief, but their complaint was dismissed without opinion. The Court of Appeals affirmed the dismissal, holding that the evidence supported the administrative findings that the magazines were obscene and thus non-mailable matter. This Court reversed in a judgment announced by Mr. Justice Harlan.

The Court thought the dispositive question to be whether or not the magazines were in fact obscene. 370 U.S. 478, at 488. On this issue, the Court noted that the determination below had been made under improper assumptions as to the law of obscenity. The Court, however, decided against remanding the case for an initial determination of the obscenity issue below:

> "Whether this question (of obscenity) be deemed one of fact or of mixed fact and law, *see Lockhard and McClure, Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 114-115 (1960), we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this

missing factor in their determinations." 370 U.S., 478 at 488.

The Court decided that the determination of that issue must ultimately rest with it:

> "That issue, involving factual matters entangled in a constitutional claim, see *Grove Press, Inc. v. Christenberry*, (CA 2 NY) 276 F.2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves." *Id.*

The doctrine of independent review was again invoked by the Supreme Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *Jacobellis* involved a conviction of a Cleveland, Ohio, motion picture theatre operator for possessing and exhibiting the film "The Lovers." On appeal, the Court reversed in a judgment announced by Mr. Justice Brennan. On the issue of independent review, Mr. Justice Brennan, relying in part upon *Manual Enterprises, Inc. v. Day, supra*, stated:

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicated an issue of constitutional law. See *Roth v. United States, supra*, 354 U.S., at 497-498, 1 L.Ed.2d at 1541, 1515 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' *Id.*, at 498, 488, 1 L.Ed.2d at 1514; See *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488 8 L.Ed.2d 639, 647, 82 S.Ct. 1432 (opinion of Harlan, J.)." 378 U.S., at 188.

It was noted that the duty of appellate review is not a pleasant one, but it was held to be one which must be exercised:

> "We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts with this Court exercising only a limited review such as that needed to determine whether the

> ruling below is supported by 'sufficient evidence.' The suggestion is appealing, since it would lift from our shoulders a difficult, recurring and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. 378 U.S., at 187-188.

Mr. Justice Brennan, in an opinion joined by Mr. Justice Goldberg, went on to conclude that reversal was necessary since the film "The Lovers" was not obscene. This conclusion was to the film was concurred in by Mr. Justice Stewart.

The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was affirmed by this Court in the case of *Jenkins v. Georgia,* 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge". The Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene.

This Court is respectfully requested to perform the judicial duty above delineated, and thus to determine the obscenity *vel non* of the magazines and films here upon which Petitioner's conviction rests.

In any independent review, the past findings of this Court on the sole issue of obscenity have obvious bearing. In this respect, it is important to note that findings of obscenity have been reversed by this Court as to press materials devoted entirely to explicit depictions or descriptions of sexual activities, including detailed and vernacular descriptions reaching the ultimate in explicitness as to heterosexual intercourse, masturbation, bestiality, oral-genital intercourse, sadomasochism, and homosexual activity. See, *e.g., Memoirs v. Massachusetts,* 383 U.S. 413 (1966), ("Fanny Hill"); *Aday v. United States,* 388 U.S. 477 (1967), ("Sex Life of A Cop" described at 357 F.2d 855), *Corinth Publications v. Westberry,* 388 U.S. 488 (1967) ("Sin Whisper" described at 146 S.E.2d 764); *Mazes v. Ohio,* 388 U.S. 453 (1967) ("Orgy Club"); *Hoyt v. Minnesota,* 399 U.S. 524 (1970) ("The Way of a Man with a Maid," "Lady Susan's Cruise Lover," and three other books);

Grove Press v. Gerstein, 378 U.S. 577 (1964) ("Tropic of Cancer").

In the area of motion picture films, this Court has reversed findings of obscenity as to films which depict totally nude women, films which depict nude and partially nude men and women engaged in sexual gyrations, simulated intercourse, and simulated oral-genital contact, all emphasizing pubic and rectal areas; and films depicting lesbian activity and heterosexual activity between men and women. Moreover, this Court has affirmed a reversal by the Ninth Circuit Court of Appeals of finding of obscenity as to a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess*, 429 F.2d 416 (9th Cir. 1970), affirmed *sub nom. Pinkus v. California*, 400 U.S. 922 (1970).

An item of explicitness similar to that in the magazines here was before this Court in *Jenkins v. Georgia*, 418 U.S. 153 (1974). In reversing an obscenity conviction based upon the film "Carnal Knowledge" the Supreme Court noted that the film did contain scenes of nudity. The Court nonetheless reversed the conviction, however, noting:

> "There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards."

The material presently before this Court is similar to that involved in the *Jenkins* decision. Whether or not the Court might find this material to be "soft core" pornography, it is clearly not "hard core" pornography. The Court in *Jenkins* noted that material must be "hard core" in order to support a constitutional conviction. The Court quoted from *Miller* to the effect that:

> "No one (may be constitutionally prosecuted) for the sale or exposure of obscene materials unless these materials depict or describe patently offensive *'hard core'* sexual conduct." 418 U.S. 153, at 160 quoting 413 U.S. 1, at 25.

The Court thus went on to reverse the conviction since the film "Carnal Knowledge" was simply not a "public portrayal" of *hard core* sexual conduct. 418 U.S. 153, at 161.

The magazine and film here at issue, are simply not *hard core* sexual material. When judged by the standards set forth in *Miller* and reaffirmed in *Jenkins* the conclusion is inescapable that it constitutes protected speech under the *First* and *Fourteenth Amendments* of the *United States Constitution*, and cannot possibly constitute hard core sexual material. Petitioner's conviction must, therefore, be reversed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Indiana.

Respectfully submitted,

ROBERT EUGENE SMITH
Penthouse Suite E
16133 Ventura Boulevard
Encino, California 91436
(213) 981-9421

Attorney for Petitioner

Of Counsel:
ANJA MARIA SMITH
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

Appendix

APPENDIX A

IN THE SUPREME COURT OF INDIANA

ALAN H. SEDELBAUER,
Appellant,

v.

STATE OF INDIANA,
Appellee.

No. 1181 S 335
Cause No. 3-1179 A 302

APPEAL FROM ALLEN SUPERIOR COURT
The Honorable Robert E. Meyers, Judge

Filed: November 30, 1981

A. 2

TRANSFER FROM COURT OF APPEALS

GIVAN, C.J.

Appellant was convicted in the Superior Court, Allen County, on two counts of distributing obscene matter for consideration.

The Court of Appeals reversed his conviction. 402 N.E.2d 1006. Opinion on Rehearing, 405 N.E.2d 566. We grant transfer in this case, set aside the opinion of the Court of Appeals, and sustain the decision of the trial court.

In reversing the trial court, the Court of Appeals held that (1) Instruction No. 12, given by the trial court, which authorized the jury to consider whether the matter or performance had been pandered, was incomplete in that the jury should have been told of the United States Supreme Court's definition of the word "pandered"; and (2) the evidence in the record did not support the giving of the instruction.

Insofar as the first reason given, the Court of Appeals correctly quotes the Supreme Court of the United States in its definition of the word "pandering" to be, "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of the customers." *Pinkus v. United States,* (1978) 436 U.S. 293, 303, 98 S.Ct. 1808, 1815, 56 L.Ed.2d 293, 302. However, then, without quoting or reciting any of the evidence from the record, the opinion draws the conclusion that there was no evidence produced by the State to warrant giving an instruction concerning a pandering of pornographic literature. When one examines the record in this case, it is found such conclusion is wholly erroneous. The record, in fact, is replete with information of the open advertising of an adult bookstore, a clear indication of the content thereof, and explicit graphic displays inside the store, all of which could be nothing but "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of the customers." The building was described as having two large glass windows in the front which were painted over with some sort of a picture, with the words "Adult News and Book Store", and "Films, Peep Shows." Another sign on the outside of the

building said, "Swingers World." Inside the building, there were several cases and bookshelves containing such paraphernalia as dildoes, whips, chains, and magazines, the covers of which described various types of sexual activities. We hold the evidence presented by the State in this case was more than adequate to justify the use of the word "pandered" in the court's Instruction No. 12. There was ample evidence in the record from which the jury could conclude the appellant was "in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of the customers."

In as much as this Court is affirming the trial court, it becomes necessary to address the questions raised in the brief of the appellant which were not covered by the opinion in the Court of Appeals. Appellant requests this Court to independently review the alleged obscenity of the magazine "Desire" and of the film "Sweet Dixie" constituting the basis of appellant's conviction. In support of this request, they cite *Manual Enterprises, Inc. v. Day*, (1962) 370 U.S. 478, 8 L.Ed.2d 639, 82 S.Ct. 1432. This we will do, although in doing so we will sustain the decision of the trial court.

In urging this Court to exercise independent review, the appellant observes that the Supreme Court of the United States has reversed convictions concerning the publication and sale of materials devoted entirely to "explicit depictions or descriptions of sexual activities, including detailed and vernacular descriptions reaching the ultimate in explicitness as to heterosexual intercourse, masturbation, bestiality, oral-genital intercourse, sadomasochism, and homosexual activity." They also note that the Supreme Court of the United States has "reversed findings of obscenity as to films which depict totally nude women, films which depict nude and partially nude men and women engaged in sexual gyrations, simulated intercourse, and simulated oral-genital contact, all emphasizing public and rectal areas; and films depicting lesbian activity and heterosexual activity between men and women."

There can be little question that the above described matters could not, in and of themselves, be classified as obscene. Certainly, within the definition of art, the human race has for generations depicted the naked human body in various

postures calculated to be pleasing to the viewer and to possess cultural value. In the field of medicine, including publications calculated to instruct persons as to their bodily functions, it is fitting and proper to show both male and female genitals to describe the functions thereof, and to explicitly depict the function of sexual arousal and intercourse itself. We see no difference whether this is accomplished by illustrated printed matter or by film, either movie or slide. Certainly, it is the desire of most every parent to educate his child concerning his bodily functions and in the due course of time, according to the age of understanding of the child, to instruct that child concerning explicit sexual activities. It is the hope of nearly every parent that his child will grow to adulthood with a healthy libido which will enable it to enjoy sex to the fullest, to respect the dignity of his sex partner, and to be blessed with the ability to produce offspring which are both mentally and physically normal.

The First Amendment guarantees each citizen the freedom of speech and publication to accomplish these ends. This freedom, however, does not give license for the utterance or publication of any and every conceivable variation of the subject matter, if that utterance or publication impinges upon the freedom of others to enjoy life in an acceptable manner according to the standards of the community.

It is not the subject matter that is obscene in any situation, it is the manner in which the subject matter is presented that constitutes obscenity. For instance, a nude model may be presented to an art class to aid in the instruction of the students as to how to depict the nude human form. The model may be presented in a wholly acceptable manner and not be considered as lewd or obscene. However, one could take that same model and by a slight change in pose and setting transform that same person into a lewd and obscene object. The difference would be readily discernible to any member of society.

In reading the appellant's brief in its entirety, one is led to the conclusion that it is his object to have this Court make a statement that, in fact, there is no such thing as obscenity. However, we must turn to the statutes which have been passed by men and women who are in touch with the realities and

standards of the communities from which they come, and to cases such as the case at bar that have been submitted to juries of men and women who are familiar with the standards of their community. It cannot be presumed that each and every one of these persons has a jaded and perverse concept of sex or the functions of the human body and that they are, in fact, in error when they perceive there is conduct which they should seek to prevent because of its objectionable nature. Again, we must presume it is not the subject itself which these people perceive to be obscene, but the manner in which the subject is presented that makes the activity obscene.

It is often heard in judicial circles, "I can't describe obscenity but I know it when I see it." However, such an observation is not adequate for our purposes here. What is it the legislator has in mind when he passes an obscenity statute? What is it the juror has in mind when he votes for a conviction of a defendant on a charge of obscenity? We must presume that these are normal people functioning in our society; enjoying the pleasures of their sexuality; reproducing, raising children whom they, in turn, hope will enjoy their own sexuality. Therefore, it cannot be the subject of the human body or of sexuality that they are perceiving to be obscene. One must presume the statutes are passed and the verdicts are rendered because of a perception of presentation of a subject which is offensive. The question then is, why is a certain presentation offensive? In the field of human bodily function, and more particularly in the function of the sexuality of the human being, most people perceive sexuality as extremely personal and private. They view their relationship with their mate as being a very pleasureful, intimate, and rewarding experience. They realize the frailties of the human body and the reproductive organs, and the tragedy that results from abuse of those parts. They recognize the physical and mental well-being of the present generation. The pleasureful urge to mate leads to reproduction, which in turn leads to an urgency to produce children who in their turn will develop into adults who can enjoy their sexuality in a healthy manner calculated to maintain the respect of their sexual mate. So long as the presentation of sexuality remains within the accepted forms of our literature and medical

journals, these people do not perceive the same to be obscene but, in fact, a pleasureful, desired, and necessary part of the overall picture of a civilized society. However, when presentation takes the form of a gaudy, flippant, frivolous, or distorted attitude the observer is then offended. A thing which he holds dear and a relationship which he cherishes with another person is made to appear cheap and lustful. The process of reproduction with which he has been entrusted becomes a thing to be taken lightly and abused to the potential detriment of the individual and to the next generation. A person who is quite willing to enter into a discussion of the sexuality of a human being with his children, or who is quite willing to give them medical journals, some explicit in pictorial presentation, suddenly finds himself with a type of presentation that would be wholly unacceptable to such use. This is an emotion which should be readily recognized by almost anyone.

We now examine the material placed in evidence by the State in the prosecution in the case at bar. We must determine whether or not this literature fits the definition set forth in a statute passed by our Legislature, and whether or not the jurors observing this material correctly catagorized it as being obscene within the meaning of the statute.

The magazine which was marked as State's Exhibit 1 is of gaudy color and design, in large letters one and three-quarter inches in height is the word "Desire." Above that word, in letters one-quarter inch in height are the words "A Magazine for Adults Only," the price on the face of the magazine is quoted at $10.00, the cover picture on the magazine shows a couple engaged in oral-genital sexual contact. The magazine is largely a pictorial in both black and white and color. The pictures show a man and a woman in various stages of undress in all manner of sexual contact: anal, oral, and genital. The sparse written material interspersed with the pictures purports to be quotations from such learned lexicons as Webster's dictionary defining such words as "stimulus" presumably added to give some redeeming feature to the publication. However, in reading the written material one finds the exact words repeated on a succeeding page as were read on the prior page. This leads to the conclusion the material was picked at random, not very

carefully edited, and merely added for some reason other than its literary content. The back of the magazine is in full color and depicts a nude couple with the woman in posterior position in sexual connection. Although many of the pictures in the magazine might be placed in a medical book for demonstrative purposes and in such surrounding would be perfectly acceptable, when one views the overall package of this magazine, it becomes abundantly apparent it was produced and sold for the purpose of "commercial exploitation of erotica solely for the sake of prurient appeal." *Ginzburg v. United States,* (1966) 383 U.S. 463, 466, 86 S.Ct. 942, 945, 16 L.Ed.2d 31, 35.

The eight millimeter film involved in this case is a reel containing approximately 45.7 meters, is packaged in a cardboard box, gaudily colored, with the words "Sweet Dixie" on the top of one side. Under the words is a picture of two women and one man engaged in oral-genital contact and in a position implying masturbation. Beneath the picture, we find the words "Savannah Pudding"; below that, the words "Starring Savannah Swingers." On the back side of the package, we find six pictures, one of which is a smaller edition of the cover picture, the others show similar poses of various persons in oral-genital contact, and in one picture a group of five persons engaged in various types of sexual contact. On the back side are also the words "Savannah Pudding", "Birmingham Blow Out", "Johanna", and "Southern Style." On the edges of the box, we find the words "Vivid Color." The film in its entirety depicts several adult male and female human beings, engaged in various types of oral, anal, and genital contact with each other. There is nothing about the film or the cover in which it is contained that purports to be scientific or educational. It is hardly the type of thing one would give to one's offspring to prepare them for their life as a sexual adult. Again, it is abundantly apparent that this film was produced for "commercial exploitation of erotica solely for the sake of prurient appeal." *Ginzburg, supra.*

Appellant raises the following issues which were not covered by the opinion of the Court of Appeals.

"Are the materials charged against appellant obscene as a matter of law or do they constitute protected expression under the *First* and *Fourteenth Amendments* to the *United States*

Constitution?" In view of the foregoing, and under the authority of *Ginzburg, supra,* we hold that the materials charged against the appellant are, in fact, obscene, that they are not protected either under the First Amendment or the Fourteenth Amendment and, in fact, the general population of the community is entitled to the protection of the Constitution in having them excluded from public display and sale. We cannot believe the framers of the Constitution ever intended the First Amendment to be used to turn society over to the basest element in our population.

Appellant next asks the question, "Is evidence constitutionally sufficient to support a finding of *scienter,* where the defendant did not know the nature and character of the contents of the material sold?" This question by the appellant borders on the ludicrous. Any adult human being who could pick up the packages, above described, and sell them to a customer in a store, as above described, would indeed be out of touch with reality if he did not know and understand the nature of the object he was selling.

Appellant next asks the question, "Did the trial court err in substituting for defendant's jury instructions of 'tolerance' in determining community standards, the much narrower standard of 'acceptance'?" This question raises a specious argument which appellant attempts to support by citing the case of *Miller v. California,* (1973) 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607. He proceeds then in his brief to quote Chief Justice Burger writing in the *Miller* case as saying:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found *tolerable* in Las Vegas, or New York City." *Id.* at 32, 93 S.Ct. at 2619, 15 L.Ed.2d at 435.

According to appellant, the use of the word "tolerable" in that context in the opinion is support for the theory that the standard of conduct must not merely be acceptable in the community. We see no basis for such an interpretation of Chief Justice Burger's language. In fact, it should be noted that the word "accept" is used in the line immediately above the word "tolerable." For additional authority, appellant cites *Pinkus v.*

United States, (1978) 436 U.S. 293, 56 L.Ed.2d 293, 98 S.Ct. 1808. He cites the following quotation from the *Pinkus* case:

> "'[T]he Court has held . . . local rather than national standards should be applied. *Hamling v. U.S., supra.* Similarly, obscenity is to be judged according to the *average person* in the community, *rather than the most prudish or the most tolerant.*'" (Emphasis added.) *Id.* at 299 98 S.Ct. at 1813, 56 L.Ed.2d at 300, *quoting* from *Smith v. U.S.,* (1977) 431 U.S. 291, 304, 97 S.Ct. 1756, 1765, 52 L.Ed.2d 324, 337.

He cites this language for the proposition that the material should be tolerated by the community rather than accepted by the community. Webster's Third New International Dictionary defines the word "accept", *inter alia,* "To take without protest: endure or tolerate." It defines the word "tolerate", *inter alia,* "To endure, to put up with." Appellant has attempted to construct an argument here based upon what we perceive to be unrelated language lifted from context from opinions of the Supreme Court of the United States and has attempted to convince this Court that the trial court should be reversed because of the choice between words, which according to the dictionary are virtually interchangeable. We hold the trial court did not err in using the word "accept" in giving instructions to the jury rather than the word "tolerate" as requested by the defendant.

The State's Petition to Transfer is granted; the decisions of the Court of Appeals are vacated, and the trial court is in all things affirmed.

GIVAN, C.J.
Prentice and Pivarnik, JJ., concur.
Hunter, J., concurs in result only.
DeBruler, J., dissents with separate opinion.

A. 10

IN THE SUPREME COURT OF INDIANA

ALAN H. SEDELBAUER,
Appellant,

v.

STATE OF INDIANA,
Appellee.

No. 1181 S 335

Filed: November 30, 1981

ON PETITION TO TRANSFER

DeBRULER, J.–Dissenting

I agree with the Court of Appeals that there was no evidence to warrant giving the instruction on pandering. "Pandering" in the context of a prosecution for distributing obscene materials is a term of art of constitutional dimension. As Justice Givan points out, "pandering" is "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of . . . customers." *Pinkus v. United States,* (1978) 436 U.S. 293, 303, 98 S.Ct. 1808, 1815, citing *Ginzburg v. United States,* (1966) 383 U.S. 463, 467, 86 S.Ct. 942, 945, 56 L.Ed.2d 293, in turn citing *Roth v. United States,* (1957) 354 U.S. 476, 495-496, 77 S.Ct. 1304, 1314-1315, 1 L.Ed.2d 1498 (Warren, J., concurring). The evidence relied upon by the State consisted of signs on the building ("Adult News and Bookstore", "Swingers World Bookstore", and "Films and Peep Shows"), and inside the store on a magazine rack ("Asses, Tits, and Other Things"). None of these signs constitutes "textual or graphic material openly advertised to appeal to the erotic interest of . . . customers," in the sense intended in *Roth, supra* (mailing obscene circulars and advertising, and an obscene book); *Ginzburg, supra* (mailing obscene publications and advertising telling how and where the publications might be

obtained; and *Pinkus, supra* (mailing brochures illustrating sex books, magazines, and films).

A state has a "legitimate interest in prohibiting disseminating or exhibition of obscene material *when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or exposure to juveniles.*" (Emphasis added.) *Miller v. California,* (1973) 413 U.S. 15, 18-19, 93 S.Ct. 2607, 2612, 37 L.Ed.2d 419. The mere advertising of the name "Swingers World Bookstore" and a plain description of the nature of the materials sold there as "adult" is not evidence of the kind of obtrusive advertising contemplated by the United States Supreme Court as a factor to be considered "to aid a jury in its determination of whether materials are obscene. . . ." *Splawn v. California,* (1977) 431 U.S. 595, 598, 97 S.Ct. 1987, 1990, 52 L.Ed.2d 606. There is no evidence of the kind of representation of the materials as "would tend to *force public confrontation* with the potentially offensive aspects of the work. . . ." (Emphasis added.) *Ginzburg v. United States,* 383 U.S., at 470, 86 S.Ct., at 947. On this basis, the conviction should be reversed.

I also dissent from the majority's independent determination of obscenity as it is not based upon application of the constitutional test for obscenity set out in *Miller v. California, supra,* and embodied in the obscenity statute under which Sedelbauer was charged.

APPENDIX B

402 North Eastern Reporter, 2d Series 1006

ALAN H. SEDELBAUER,
Defendant-Appellant,

v.

STATE OF INDIANA,
Plaintiff-Appellee.

No. 3-1179A302.

Court of Appeals of Indiana,
Fourth District

April 2, 1980

Defendant was convicted in the Superior Court, Allen County, Robert E. Meyers, J., on two counts of distributing obscene matter for consideration, and he appealed. The Court of Appeals, Young, J., held that: (1) instruction which authorized jury to consider whether the matter or performance had been pandered, was incomplete in that jury should have been told of United States Supreme Court's definition of the word and it was error to give the instruction without it, and (2) evidence did not support the instruction.

Reversed.

Opinion on rehearing, 405 N.E.2d 566.

1. **Criminal Law ⇐ 800(4)**

Instruction given in prosecution of defendant for distributing of obscene matter for consideration, in which jury was authorized to consider whether the matter or performance had been pandered, was incomplete in that jury should have been told of United States Supreme Court's definition of the word and it was error to give the instruction without it. IC 35–30–10.1–2(2) (1976 Ed.).

2. **Obscenity ⇐ 20**

Evidence, which established only that defendant, a clerk, recited price of films when asked by undercover vice squad officers and which did not establish that any performance took place in or about premises of bookstore, was insufficient to support obscenity instruction in prosecution of defendant on charge of distributing obscene matter for consideration. IC 35–30–10.1–2(2) (1976 Ed.).

K. Richard Payne, Fort Wayne, Robert Eugene Smith, Atlanta, Ga., for appellant.

Theodore L. Sendak, Atty. Gen., Thomas D. Quigley, Deputy Atty. Gen., Indianapolis, for appellee.

YOUNG, Judge.

Appellant Sedelbauer was convicted on two (2) counts of Distributing Obscene Matter for Consideration in violation of IC 35–30–10.1–2(2), sentenced on both counts to thirty (30) days imprisonment and fined Three Thousand Dollars ($3,000.00). He appeals arguing that the giving of court's instruction no. 12 was error. We agree and reverse.

The instruction complained of reads as follows:

> In determining the question of whether the allegedly obscene matter or performance involved, taken as a whole, lacks serious literary, artistic, political, or scientific value, the jury may consider whether the matter or performance has been pandered, by looking to the circumstances of distribution, sale, advertisement, or editorial intent, and particularly whether such circumstances indicate that the matter or performance was being commercially exploited for the sake of its prurient appeal and whether any social importance claimed was in the circumstances pretense or reality.
>
> Such evidence is probative with respect to the nature of the matter or performance, and if the jury concludes that the sole emphasis was in the sexually provocative aspect, this can justify the conclusion that the matter or performance is lacking in serious literary, artistic, political, or scientific value.

The weight, if any, which such evidence is entitled is a matter for the jury to determine.

The appellant contends that the evidence did not warrant giving this instruction and that it is misleading.

The evidence which the State urges as sufficient to justify giving the instruction is as follows:

(1) Sedelbauer was engaged in a business
(2) selling textual or graphic matter
(3) the sign on the front window of the business recited "Swingers World Book Store," "Films, Peep Shows."

[1] "Pandering" is defined by the United States Supreme Court as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of the customers." *Pinkus v. United States,* (1978) 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293. It is also a crime in Indiana, that being the conduct of procuring, or offering or agreeing to procure any person for another person for the purpose of prostitution. IC 1976, 35–45–4–4(2) (West 1978). A panderer is defined by Webster's Third New International Dictionary 1629 (1976) as

(a) a go between in love intrigues;
(b) a man who solicits clients for a prostitute—a procurer;
(c) someone who caters to and often exploits the weaknesses of others.

No definition was given to the jury. The instruction is incomplete as "pandering" is a word of art which has special meaning depending upon which definition is applicable. Obviously, Sedelbauer was not a pimp. He was a clerk whose only act was to recite the price of the films when asked by the undercover vice squad officers. The jury should have been told of the United States Supreme Court's definition of the word and it was error to give the instruction without it.

[2] The instruction is improper because there was no evidence of pandering no matter which definition is applicable. Its legal source is *Ginsburg v. United States,* (1966) 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, reh. den. 384 U.S. 934, 86 S.Ct. 1440, 16 L.Ed.2d 536. Ginsburg's conviction was for mailing material advertising and promoting the sale of *EROS* proclaiming its obscenity. No such marketing occurred here. Sedelbauer only stated a price for the film. The fact that the

establishment was named "Swingers Adult Book & News Store" adds nothing to the need for such an instruction in the absence of any proof of the meaning of the word "swinger." It could well be a surname.

Instruction no. 12 was also misleading in that no evidence was produced by the State that any performance took place in or about Swingers Adult News and Book Store. We likewise have a definition of that word furnished us by the General Assembly.

> "Performance" means any play, motion picture, dance, or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one (1) or more persons.

IC 1976, 35–30–10.1–1 (West 1978). Sedelbauer was not identified as being any of the performers in either the magazine or the film he sold. There was no evidence that he danced or acted before audiences of one or more. Nor was the motion picture exhibited[1] at the book store. The trial court should not have instructed the jury on a matter which was not supported by any evidence.

We reverse.

MILLER, P. J., and CHIPMAN, J., concur.

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[1] Exhibition means more than showing the box in which the film was packaged in this context.

APPENDIX C

405 North Eastern Reporter, 2d Series 566

ALAN H. SEDELBAUER,
Defendant-Appellant,

v.

STATE OF INDIANA,
Plaintiff-Appellee.

No. 3-1179A302.

Court of Appeals of Indiana,
Fourth District.

June 10, 1980

Defendant was convicted in the Superior Court, Allen County, Robert E. Meyers, J., on two counts of distributing obscene matter for consideration, and defendant appealed. The Court of Appeals, 402 N.E.2d 1006, reversed, and State filed petition for rehearing. The Court of Appeals, Young, J., held that: (1) endeavors to comply with obscenity statute by excluding minors and designating bookstore as "for adults only" could not be construed as form of admission that materials in question were obscene when sold to adults; (2) word "swinger" as contained in sign of front window of store stating "Swingers World Book Store" did not constitute pandering; (3) sign placed over rack of magazines in bookstore stating "Asses, tits and other things" did not constitute pandering; and (4) pandering instruction, which bore directly on issue of defendant's guilt, presumably affected jury's deliberations on matter and warranted granting new trial to defendant.

New trial.

1. **Obscenity ⇐ 7**

If selling point of material is pornography, then there is no error in taking material at seller's own evaluation.

2. **Criminal Law ⇐406(5)**

Endeavors to comply with obscenity statute by excluding minors from bookstore and designating store "for adults only" could not be construed as form of admission that materials in store were obscene when sold to adults. IC 35–30–11.1–1, 35–30–11.1–2(d) (1976 Ed.).

3. **Obscenity ⇐7**

Word "swinger" as contained in sign in front window of bookstore stating "Swingers World Adult Book Store" did not constitute pandering such as would permit a finding of obscenity in a close case.

4. **Obscenity ⇐7**

Sign placed over rack of magazines in bookstore stating "Asses, tits and other things" did not constitute pandering where sign was inside store and therefore directed only to adults, state law did not forbid sale of materials describing or depicting such matter to adults if no sexual conduct is involved, no matter how offensive or lacking in serious literary, artistic, political or scientific value, and magazine in issue in criminal prosecution was not taken from that rack. IC 35–30–10.1–1(c) (1976 Ed.).

5. **Criminal Law ⇐1172.6**

An instruction which is not warranted by evidence in criminal prosecution is reversible error.

6. **Criminal Law ⇐1172.1(3)**

Misleading pandering instruction, which was given in criminal prosecution and which bore directly on issue of defendant's guilt, presumably affected jury's deliberations on matter and warranted granting of new trial to defendant.

K. Richard Payne, Fort Wayne, for appellant; Robert E. Smith, Atlanta, Ga., on brief.

Theodore L. Sendak, Atty. Gen., Thomas D. Quigley, Deputy Atty. Gen., Indianapolis, for appellee.

YOUNG, Judge.

ON PETITION FOR REHEARING

The State petitions for rehearing in this cause on the grounds that this Court erroneously decided the appeal on the basis of an issue which was not properly preserved for review. On the basis of *McCague v. New York, Chicago & St. Louis Ry.*, (1947) 225 Ind. 83, 71 N.E.2d 569, 73 N.E.2d 48, we agree. Nevertheless we remain of the same opinion regarding the sufficiency of evidence to warrant a pandering instruction. We grant rehearing insofar as reversal is based on the misleading effect of the instruction complained of, and take this opportunity to elaborate on the pandering issue.

The State points out certain inaccuracies in our statement of the facts: there was no evidence either way as to whether Sedelbauer was a pimp; only one film and a magazine were sold; only one vice officer was involved; and in addition to reciting the price of the materials sold, Sedelbauer accepted the tendered purchase price, worked the cash register, gave change, and placed the goods in the sack. The vice officer testified that Sedelbauer unlocked a display case so that the officer could obtain the film he said he wanted. The point we endeavored to make is that nothing in this list is probative of pandering. *Ginzburg v. United States*, (1966) 383 U.S. 463, 474, 86 S.Ct. 942, 949, 16 L.Ed.2d 31. *See Redrup v. New York*, (1967) 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515.

The only evidence of any sort of advertising concerns various signs. Three in the front window state respectively, "Swingers World Book Store," "Adult News and Book Store" and "Films, Peep Shows." One inside the store and placed over a rack of magazines states "Asses, tits and other things."

[1, 2] The State argues that we ignore the meaning and effect of the word "adult," quoting Justice Stevens' dissent in *Splawn v. California*, (1977) 431 U.S. 595, 97 S.Ct. 1987, 52 L.Ed.2d 606. We believe a closer reading of Justice Stevens' dissent provides the response to the State's argument:

> Truthful statements which are neither misleading nor offensive are protected by the First Amendment even though made for a commercial purpose. *Virginia Pharmacy*

Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346. Nothing said on petitioner's behalf in connection with the marketing of these films was false, misleading, or even arguably offensive either to the person who bought them or to an average member of the community. The statements did make it clear that the films were "sexually provocative," *but that hardly a confession that they were obscene*. And, if they were not otherwise obscene, I cannot understand how these films lost their protected status by being truthfully described.

Even if the social importance of the films themselves is dubious, there is a definite social interest in permitting them to be accurately described. Only an accurate description can enable a potential viewer to decide whether or not he wants to see them. Signs which identify the "adult" character of a motion picture theater or a bookstore convey the message that sexually provocative entertainment is to be found within; under the jury instructions which the Court today finds acceptable, these signs may deprive otherwise nonobscene matter of its constitutional protection. Such signs, however, also provide a warning to those who find erotic materials offensive that they should shop elsewhere for other kinds of books, magazines, or entertainment. *Under any sensible regulatory scheme, truthful description of subject matter that is pleasing to some and offensive to others ought to be encouraged, not punished*.

431 U.S. at 602-03, 97 S.Ct. at 1992. (Emphasis added.) (Footnotes omitted.) Footnote three states:

3. It is ironic that in upholding obscenity laws this Court has stressed the State's "legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller v. California*, 413 U.S. 15, 18-19, 93 S.Ct. 2607, 2612, 37 L.Ed.2d 419 (footnote omitted).

Id.

The point of the pandering issue is how the seller represents the material to potential purchasers. If the selling point is pornography, then there is no error in taking the material at the seller's own evaluation. *United States v. Pellegrino*, (9th Cir. 1972) 467 F.2d 41, 45. It is simply unfair, however, to characterize an adults only sign as pandering. Indiana law defines obscenity less stringently where minors are concerned. Compare IC 1976, 35-30-11.1-2(d), with IC 1976, 35-30-10.1-1(c). *See Pinkus v. California*, (1976) 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293, *Jacobellis v. Ohio*, (1964) 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793. For this reason, endeavors to comply with IC 1976, 35-30-11-1-1, by excluding minors cannot be construed as a form of admission that the materials in question are obscene when sold to adults. As stated in *People v. Wrench*, (1974) 83 Misc.2d 95, 371 N.Y.S.2d 833, at 838:

> The defendant has, by posting the notices, shown his intent to bring himself within the letter of the law. He is not pandering as is found in *Ginzburg*. . .. The defendant is clearly avoiding a '. . .mode of dissemination. . .' which . . .carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. . . .

A similar interpretation appears in *Huffman v. United States*, (D.C.1971) 470 F.2d 386, reg. granted 470 F.2d 404, (1972), convictions reversed 502 F.2d 419 (1974), where an adults only sign was considered to demonstrate the *absence* of a claim that the defendants "pandered, or distributed to the young, or flaunted their wares on the public." 470 F.2d at 397, and fn. 18.

It is important to note that the effect of pandering in *Ginzburg* was to render obscene in those circumstances materials which in themselves were not. To consider the Adult News and Book Store sign in issue here as sufficient to trigger a *Ginzburg* pandering instruction is tantamount to instructing the jury they may find anything obscene if sold in a book store that does not admit minors.

[3] The State contends we do not accord the word "swinger" its full meaning taken in context. Even so, we do not

consider it pandering such as would permit a finding of obscenity in a close case. Indeed, this result is necessarily implied in the reversal of a case quite similar to this now before us. In *Orito v. State*, (1972) 55 Wis.2d 161, 197 N.W.2d 763, the court found that among other things the name of the Swingers World Adult Books store fell within the meaning of pandering so as to warrant an instruction. In *Orito v. Powers*, (7th Cir. 1973) 479 F.2d 435, the court found the material in question was protected under the First Amendment, notwithstanding that the name of the book store was Swingers World Adult Books.

[4] With regard to the sign placed over a rack of magazines stating "Asses, tits and other things," we note three circumstances. First, it was inside the store and therefore directed only to adults. Second, Indiana law does not forbid the sale of materials describing or depicting such matter to adults if no sexual conduct is involved, no matter how offensive or lacking in serious literary, artistic, political or scientific value. IC 1976, 35-30-10.1-1(c). Third, the magazine here in issue was not taken from that rack. We do not perceive any rational basis for construing that sign as indicating anything at all about the materials here in question, much less as pandering them. Even were we to attempt so tenuous a justification as a guilt-by-association analysis, there is no guilt in the first place and no association except physical proximity.

[5, 6] It is well settled that an instruction which is not warranted by the evidence is reversible error. *Cooper v. High*, (1974) 262 Ind. 405, 317 N.E.2d 177; *Christian Super Chevrolet Corporation v. State*, (1976) Ind.App., 346 N.E.2d 602; *Birdsong v. ITT Continental Baking*, (1974) 160 Ind.App. 411, 312 N.E.2d 104. Because the instruction here in question bears directly on the issue of guilt we may presume it affected the jury's deliberations on this matter. *See Hatton v. Hodell Furniture Co.*, (1920) 72 Ind.App. 357, 125 N.E. 797; *National Motor Vehicle Co. v. Pake*, (1915) 60 Ind.App. 366, 109 N.E. 787. *See also Allman v. Malsbury*, (1946) 224 Ind. 77, 65 N.E.2d 106.

For this reason Sedelbauer is entitled to a new trial.

MILLER, P. J., and CHIPMAN, J., concur.

APPENDIX D

Constitutional and Statutory Provisions

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law. . .abridging the freedom of speech, or the press. . . ."

2. The pertinent provisions of the Fourteenth Amendment are:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction in the equal protection of the law."

Opposition

81-1421

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No. 84-1421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ALAN H. SEDELBAUER,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

LINLEY E. PEARSON
Attorney General of Indiana
WILLIAM E. DAILY
Deputy Attorney General
THOMAS D. QUIGLEY
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6217
Attorneys for Respondent

Central Publishing Company, Inc., Indianapolis, IN 46206

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Respondent State of Indiana believes that all matters raised by Petitioner in his Petition for a Writ of Certiorari to the Supreme Court of Indiana are adequately answered by reference to *Splawn v. California* 431 U.S. 595 (1977), and Respondent respectfully prays this court to deny issuance of a writ of certiorari.

STATUTES INVOLVED

Indiana Code Section 35-30-10.1-1:

As used in this chapter: (a) "Matter" means (i) any book, magazine, newspaper, or other printed or written material; (ii) any picture, drawing, photograph, motion picture, or other pictorial representation; (iii)

any statue or other figure; (iv) any recording, transcription, or mechanical, chemical, or electrical reproduction; or (v) any other articles, equipment, machines, or materials.

(b) "Performance" means any play, motion picture, dance, or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one [1] or more persons.

(c) A matter or performance is "obscene" if:

(1) The average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;

(2) The matter or performance depicts or describes, in a patently offensive way, sexual conduct; and

(3) The matter of performance, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(d) "Sexual conduct" means (i) sexual intercourse or deviate sexual conduct; (ii) exhibition of the uncovered genitals in the context of masturbation or other sexual activity; (iii) exhibition of the uncovered genitals of a person under sixteen [16] years of age; (iv) sado-masochistic abuse; or (v) sexual intercourse or deviate sexual conduct with an animal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

(g) "Distribute" means to transfer possession for a consideration.

(i) "Owner" means any person who owns or has legal right to possession of any matter.

Indiana Code Section 35-30-10.1-2:

A person who knowingly or intentionally:

(1) Sends or brings into Indiana obscene matter for sale or distribution; or

(2) Offers to distribute, distributes, or exhibits to another person obscene matter; commit a class A misdemeanor. However, the offense is a class D felony if the obscene matter depicts or describes sexual conduct involving any person who is or appears to be under sixteen [16] years of age.

ARGUMENT

I.

PETITIONER'S ARGUMENT ON THE ISSUE OF "PANDERING" IS BASED ON MISREPRESENTATIONS OF FACT AND LAW

The following instruction was read to the jury prior to their deliberations:

> In determining the question of whether the allegedly obscene matter of performance involved, taken as a whole, lacks serious literary, artistic, political, or scientific value, the jury may consider whether the matter or performance has been pandered, by looking to the circumstances of distribution, sale, advertisement, or editorial intent, and particularly whether such circumstances indicate that the matter or performance was being commercially exploited for the sake of its prurient appeal and whether any social importance claimed was in the circumstances pretense or reality.
>
> Such evidence is probative with respect to the nature of the matter or performance, and if the jury concludes that the sole emphasis was in the sexually provocative aspect, this can justify the conclusion that the matter or performance is lacking in serious literary, artistic, political, or scientific value.

> The weight, if any, which such evidence is entitled is a matter for the jury to determine.

A witness for the prosecution testified as to the signs inside and outside the store and testified as to the display racks. The box containing the film and the cover of the magazine speak for themselves. This evidence appears to be relevant to "manner of distribution,...sale...advertising" *Hamling v. United States* 418 U.S. at 131; therefore the instruction as properly given. *Pinkus v. United States* 436 U.S. 293, (1978); *Splawn v. California* 431 U.S. 595, (1977).

Petitioner attempts to bolster his argument by misrepresenting or taking out of context portions of the opinion of the Supreme Court of Indiana. For instance, at page 5 of the Petition for a Writ of Certiorari the following sentence occurs:

> In its determination, the majority opinion by Chief Justice Givan erroneously ascribed weight to the fact that a profit may have been derived from the sale of the publication, because of its price tag.

An examination of Chief Justice Givan's opinion reveals that the Chief Justice mentioned the price of the magazine while describing the printed material on its cover. Nowhere does the Chief Justice "ascribe weight to the fact that a profit may have been derived from the sale of the publication."

A particularly objectionable misrepresentation of facts occurs at page 4 of the Petition:

> Furthermore, there was no showing that the movie at issue appealed to prurient interest.

Inasmuch as the movie consists solely of various explicit sexual activities by a group two men and three women, Petitioner's statement is ridiculous.

II.

PETITIONER HAS MATERIALLY MISREPRESENTED THE FACTS IN ORDER TO PRESENT AN ARGUMENT ON THE ISSUE OF *SCIENTER.*

Under the Indiana obscenity statute (IC 35-30-10.1-2, set forth at p. 3, *supra*), the State must prove beyond a reasonable doubt that the defendant "knowingly or intentionally...distributes...obscene matter." Neither the decision of the Supreme Court of Indiana in this case nor any other Indiana appellate decision has ever adopted a "constructive knowledge" standard.

The record overwhelmingly supports a finding that defendant had *actual* knowledge of the character and nature of the magazine and film. The relevant evidence culminates in an admission on the stand by the defendant that he had browsed through the books he sold and had a general idea of what was contained in the magazines and films sold by the store.

If the factual record in this case does not meet the *scienter* requirements of *Hamlin v. United States*, 418 U.S. 87 (1974), no case ever will.

III.

IT IS PROPER TO INSTRUCT THE JURY THAT IT MAY FIND MATERIAL OBSCENE IF THE JURY FINDS, AMONG OTHER THINGS, THAT THE MATERIAL GOES SUBSTANTIALLY BEYOND WHAT THE COMMUNITY FINDS "ACCEPTABLE."

The portion of the lengthy Final Instruction #9 to which Petitioner objects instructed that:

> You must determine whether or not this material violates those standards; in other words, whether it

goes substantially beyond the limits of candor that the community deems acceptable in the description or depiction of sexual conduct. Again, this must be based on the material as a whole, and not on isolated exerpts.

Contemporary community standards are determined by what the community as a whole in fact finds acceptable. The community as a whole is society at large, and not particular people or particular groups. In this regard, you should consider what is going on, not necessarily what ought to be going on. What some people think the community ought or ought not to accept is not important, nor is what you, as an individual juror, think is good or bad. It is what people in general, the community as a whole, accept that is determinative.

Petitioner's assertion that the use of "accept" is intolerable is based upon his misconstruction of certain language of the Supreme Court of the United States, and upon a 1979 Tennessee case in which the Supreme Court of that state made the same error.

In *Leech v. American Booksellers Association, Inc.* _____ Tenn. _____, 582 S.W.2d 738 (1979), the Supreme Court of Tennessee invalidated that state's obscenity laws in a sweeping decision which declared, *inter alia*, that they were void for vagueness. In the course of this invalidation, the court found that the statutory use of "accept" restricted speech beyond the constitutional limit declared by the Supreme Court of the United States. It apparently rested this conclusion partly upon a sentence from a Supreme Court case, discussed *infra*, and principally upon some of "the shades of meaning of the noun 'acceptance.'" *Id.* at 748.

It can scarcely be denied that "tolerate" and "accept" have "shades of meaning" which are different. As used in the instruction now under consideration, however, they are synonymous; the Supreme Court of the United States, as will be shown, uses them interchangeably in the obscenity context, and the dictionaries agree.

A reading of The American Heritage Dictionary (1978), upon an earlier edition of which the Tennessee court based its conclusion, shows that "accept" may mean, "To receive as adequate or satisfactory," "To regard as usual, proper or right," "To bear up under resignedly or patiently." *Id.* at 7. The entry under "accept" directs the reader to, "See Synonyms at *assent*"; there, it is said that "accept" means "to go along with another's views, proposals, or actions... *Accept* may indicate agreement with some reluctance." *Id.* at 79. Whatever difference may exist between this aspect of "accept" and the meanings of "tolerate" (*id.* at 1351) is so slight as to be legally imperceptible in the context of the instruction now at issue. The State presumes that the Tennessee court's semantic hairsplitting was designed to forestall construction problems with the statute, which foreseeably would be subjected to close scrutiny by prosecutors, defense attorneys, judges and booksellers; the instant situation is different, however, because the fundamental issue here is how the jurors understood the instruction.

A brief review of United States Supreme Court cases, including the language upon which *Leech* depends, shows that the Court considers "accept" to be synonymous with "tolerate"; it will use either word, or both if the concept is repeated in a sentence. The language quoted in *Leech* reads somewhat differently when read in context:

> Our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community does not mean, as has been suggested, that obscenity convictions will be unreviewable.

Smith v. United States 431 U.S. 291, 305, (1977). Two points should be noted about the quote *supra*: the insertion of "acceptance" for "tolerance" preserves the Court's meaning; and in any case the Court was not directing its attention to "tolerance," but to the reviewability of verdicts.

It is noteworthy that Justices Brennan, Stewart and Marshall, dissenting in *Smith*, quoted this sentence from an earlier case:

> "We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue [*i.e.*, the community standards] which would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency."

Id. at 312 n. 4, 97 S. Ct. at 1769 n. 4 (Brennan, J., dissenting) (citation omitted).

The Court, per Mr. Chief Justice Burger, has quoted with approval this passage from a dissent in an earlier obscenity case:

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.

Miller v. California 413 U.S. 15, 32, (1973) (footnote omitted). Here, as in the passage from *Smith* quoted *supra*, the meaning of the sentence does not change when "tolerate" is substituted for "accept," and "acceptable" for "tolerable."

Hamling v. United States 418 U.S. 87, (1974) contains the following passage discussing the construction of 18 U.S.C. § 1461, the statute prohibiting the use of the mails to carry any obscene matter:

> And as made clear by the opinion of Mr. Justice Harlan in *Manual Enterprises*, the language of 18 U.S.C. § 1461 had been, prior to the date of our decision in *Miller*, authoritatively construed in a manner consistent with *Miller*:

> "The words of § 1461, 'obscene, lewd, lascivious, indecent, filthy or vile,' connote something that is portrayed in a manner so offensive as to make it unacceptable under current community mores."

Hamling at 112.

Respondent has not found, and Petitioner does not cite, any case in which the Supreme Court as much as appears to have considered the "standard" he proposes. No such standard exists, nor should one exist, since "accept" and "tolerate" are synonyms in the instant context. *See* Webster's Seventh New Collegiate Dictionary 5, 930 (1971). Final Instruction #9 was properly given.

IV.

Petitioner requests that this Court independently review the magazine and movie at issue herein. Respondent also urges the Court to review the material at issue and then determine whether Petitioner's attorneys have made a deliberate and material misrepresentation in the following sentences found at pages 18 and 19 of the Petition for a Writ of Certiorari:

> In reversing an obscenity conviction based upon the film "Carnal Knowledge" the Supreme Court noted that the film did contain scenes of nudity. The Court nonetheless reversed the conviction, however, noting:
>
> > "There are occasional scenes of nudity, nudity alone is not enough to make material legally obscene under the *Miller* standards."
>
> *The material presently before this Court is similar to that involved in the Jenkins decision.** Whether or not the Court might find this material to be "soft core" pornography, it is clearly not "hard core" pronography. The Court in *Jenkins* noted that material must be "hard core" in order to support a constitutional conviction....
>
> *[Emphasis added]

The magazine and film here at issue, are simply not *hard core* sexual material. When judged by the standards set forth in *Miller* and reaffirmed in *Jenkins* the conclusion is inescapable that it constitues protected speech under the *First* and *Fourteenth Amendments* of the *United States Constitution*, and cannot possibly constitute hard core sexual material.

CONCLUSION

For these reasons, the Petition for writ of certiorari to review the judgment and opinion of the Supreme Court of Indiana should be denied.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana
WILLIAM E. DAILY
Deputy Attorney General
THOMAS D. QUIGLEY
Deputy Attorney General
Attorneys for Respondent